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U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Peavey Electronics Corporation

v.

Gemini Sound Products Corp.

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Cancellation No. 21,786

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Donald N. Huff of Watson, Cole, Grindle & Watson for Peavey  
Electronics Corporation.

Ezra Sutton for Gemini Sound Products Corp.

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Before Cissel, Hanak and Seeherman, Administrative Trademark  
Judges.

Opinion by Hanak, Administrative Trademark Judge:

On May 5, 1993 Peavey Electronics Corporation  
(petitioner) filed a petition to cancel Registration No.  
1,764,327 owned by Gemini Sound Products Corporation  
(respondent or registrant). This registration, which issued  
on April 13, 1993, is for the mark PVX in typed capital  
letters for "audio equalizers, amplifiers and pre-  
amplifiers." The application which matured into this

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registration was filed on August 31, 1992 with a claimed first use date of February 1991.

In its petition for cancellation, petitioner alleged that long prior to February 1991, petitioner both used and registered PEAVEY for a wide variety of musical electronic apparatus specifically including equalizers and amplifiers. Moreover, petitioner further claimed that long prior to February 1991, it used and registered the mark PV for microphones. Finally, petitioner alleged that respondent's use of the mark PVX is likely to cause confusion, deception and mistake vis-a-vis petitioner's marks PEAVEY and PV. In particular, petitioner alleged that with regard to its mark PV and respondent's mark PVX, "the suffix designation X as used in the musical electronics trade, and other marketing arenas, often connotes a shortened form of the word EXTRA. As such, the use of the letter X in conjunction with the letters PV does not render the registrant's mark [PVX] distinctive of registrant's goods over petitioner's prior usage of the letters PV and the phonetic pronunciation of petitioner's trade name and PEAVEY mark." (Petition paragraph 5).

Respondent filed an answer which denied the pertinent allegations of the petition for cancellation.

Petitioner filed a brief. Respondent failed to file a brief in a timely fashion. Instead, it filed a motion to

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reopen respondent's time for filing its main brief. As explained in this Board's order of April 2, 1997, respondent's motion was denied. The Board stated that "no brief from respondent will be accepted." However, in its order of April 2, 1997 this Board allowed both parties 30 days in which to file requests for oral argument. Neither party did so.

By means of a notice of reliance, petitioner has made of record, among other things, certified status and title copies of its registrations of PEAVEY and PV; registrant's responses to requests for admission nos. 1-11; registrant's answers to petitioner's interrogatories nos. 1-22; the deposition of registrant's president (Isaac Cabasso); and articles appearing in various magazines. In addition, with this same notice of reliance petitioner submitted a copy of registrant's memorandum in opposition to petitioner's motion for summary judgment and a copy of Mr. Cabasso's affidavit in support of said memorandum. In so doing, petitioner cited Trademark Rule 2.120(j). Quite frankly, we are perplexed as to why petitioner would wish to make of record respondent's memorandum and the affidavit of respondent's president. Obviously, both of these items make arguments which are favorable to respondent, and not petitioner. Moreover, Trademark Rule 2.120(j) deals with discovery depositions, answers to interrogatories and requests for

admission. This rule does not discuss briefs in support of or against summary judgment and accompanying affidavits or declarations.

Nevertheless, in fairness to respondent, we will consider respondent's brief in opposition to petitioner's motion for summary judgment and the affidavit of respondent's president in reaching our final decision. With regard to the affidavit of respondent's president, we note that Trademark Rule 2.123(b) provides that "by agreement of the parties, the testimony of any witness or witnesses of any party, may be submitted in the form of an affidavit." Because petitioner submitted the affidavit of respondent's president and because respondent did not object to this submission (or the submission of respondent's brief), then essentially there has been an implicit agreement between the parties to have the affidavit of respondent's president treated as testimony. In this regard, we note that respondent submitted no evidence. It may well be that respondent did so because previously petitioner had submitted with its notice of reliance the affidavit of respondent's president. Because of this, respondent may then have elected not to take the testimony of its president because respondent may have been of the belief that said testimony would merely duplicate the affidavit which petitioner had previously submitted.

One final comment concerning the evidentiary record is needed. At page 5 of its brief petitioner contends that the evidentiary record includes the "exhibits filed with petitioner's motion for summary judgment [and the] declaration of Hartley D. Peavey [petitioner's chairman] in support of petitioner's motion for summary judgment." It is clear that "evidence submitted in connection with a motion for summary judgment is of record only for the purposes of that motion. If the case goes to trial, the summary judgment evidence does not form part of the evidentiary record to be considered at final hearing." Trademark Trial and Appeal Board Manual of Procedure, Section 528.05(a) at page 500-88 (1<sup>st</sup> ed. 1995). The only exception to this rule is if the evidence was "properly introduced ... during the appropriate trial period." Id. Petitioner did not qualify for this latter exception. Hence, the declaration of Hartley D. Peavey and the exhibits to petitioner's motion for summary judgment are not part of the evidentiary record and will not be considered by this Board.

We will now turn to the substance of this case, namely, the issues of priority of use and likelihood of confusion. Considering, first priority of use, petitioner owns registrations for PEAVEY and PV, and respondent owns a registration (obviously) for PVX. Under such circumstances where both parties own registrations, it is the Board's

practice "to hold that [as a practical matter] a petitioner ... must, in the first instance, establish prior rights in the same or similar mark and the respondent in turn can defeat petitioner's claim of damage by establishing that, as between the parties, it possesses [prior] superior rights in the mark sought to be canceled." United States Mineral Products v. GAF Corp., 197 USPQ 301, 305 (TTAB 1977).

Registrant has established through the affidavit Mr. Cabasso that it commenced use of its mark PVX in February 1991. (Cabasso affidavit paragraph 4). Mr. Cabasso acknowledged that "prior to [February 1991], petitioner has used the mark PV only on microphones." (Cabasso affidavit paragraph 4). Moreover, we note that the filing date of the application which matured into petitioner's Registration No. 1,435,371 for PV for "microphones" is August 25, 1986. Thus, as between petitioner's mark PV for microphones and respondent's mark PVX for audio equalizers, amplifiers and pre-amplifiers, priority of use rests in favor of petitioner.

As for petitioner's mark PEAVEY, respondent has acknowledged that at the time it first commenced use of PVX, respondent was aware of petitioner's use of the trademark PEAVEY on audio electronic products, specifically including amplifiers, pre-amplifiers and equalizers. (Respondent's responses to requests for admission 1 & 3). Indeed, when

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asked by petitioner when "registrant first became aware of petitioner's use of the mark PEAVEY in association with the marketing and sale of amplifiers," respondent answered "approximately 1974." Respondent further noted that it was Mr. Cabasso who became aware of such use as a result of advertising and trade shows. (Respondent's answer to interrogatory No. 14). Thus, respondent has admitted that petitioner first used PEAVEY on the identical products for which respondent has registered PVX, namely, amplifiers, pre-amplifiers and equalizers. Indeed, with regard to amplifiers, respondent has acknowledged that petitioner used its mark PEAVEY approximately 17 years before respondent first used its mark PVX (i.e. 1974 to 1991). Moreover, petitioner has made of record certified status and title copies of its Registration No. 1,532,800 for the mark PEAVEY depicted in typed drawing form for various goods including equalizers and amplifiers. The application which matured into this registration was filed on June 9, 1988. Thus, petitioner has established its prior rights to its mark PEAVEY in typed drawing form.

Finally, petitioner has also made of record certified status and title copies of various of its registrations for PEAVEY in the highly stylized forms show below. These registrations cover goods (equalizers and amplifiers) which are identical to certain of the goods for which respondent

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has registered PVX. However, as depicted in the highly stylized forms shown below, we find that petitioner's mark PEAVEY is so dissimilar from respondent's mark PVX such that there is no likelihood of confusion. Accordingly, we will not bother to recite the details of petitioner's registrations of PEAVEY in the highly stylized forms shown below.

We will now begin our likelihood of confusion analysis. In comparing petitioner's mark PEAVEY (typed drawing form) and respondent's mark PVX (typed drawing form), we note that petitioner has established prior rights in PEAVEY (typed drawing form) for products which are identical to two of the three products for which respondent has registered PVX (typed drawing form), namely, amplifiers and equalizers. Of course, it is important to remember that "when marks would appear on virtually identical goods or services, the degree of similarity [of the marks] necessary to support a

conclusion of likely confusion declines." Century 21 Real Estate Corp. v. Century Life of America, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992). In terms of pronunciation, the first two letters of respondent's three letter mark (PV) are either identical to or extremely similar to petitioner's mark PEAVEY. However, when respondent's mark PVX is considered in its entirety, as it must be, then the pronunciation of said mark is, at most, only somewhat similar to the pronunciation of petitioner's mark PEAVEY. Moreover, in terms of visual appearance, the marks PEAVEY and PVX are dissimilar. Likewise, in terms of connotation, the marks are also dissimilar. Petitioner has accurately characterized respondent's mark PVX as an "arbitrary arrangement of letters." (Petitioner's brief page 21). On the other hand, petitioner's mark PEAVEY is clearly a surname and would be perceived as such. Thus, in terms of connotation, an arbitrary arrangement of letters (PVX) is clearly dissimilar from a surname (PEAVEY).

Hence, we find that there is no likelihood of confusion resulting from the contemporaneous use on identical products of the marks PEAVEY and PVX. This would be true even when respondent depicts its mark PVX in manner such that the PV portion appears as a unit somewhat separated from the X portion, as will be discussed in greater length below.

We turn now to consideration of whether the contemporaneous use of PVX for equalizers, amplifiers and pre-amplifiers and PV for microphones is likely to cause confusion. Considering first the goods, while they are not competitive, they are complementary. All are audio products. In addition, by definition, microphones "are used in ... sound amplification." Webster's New World Dictionary (2d ed. 1970).

We note that in paragraph 5 of his affidavit, Mr. Cabasso states as follows: "Registrant's PVX amplifiers and pre-amplifiers are not sold to the same class of purchasers as are petitioner's PV microphones, and they do not move in the same channels of trade as petitioner's PV microphones." Whether or not respondent's particular amplifiers and petitioner's particular microphones are sold to the same class of purchasers or move in the same channels of trade is not the relevant inquiry. Rather, the relevant inquiry is whether either equalizers, amplifiers and pre-amplifiers in general and microphones in general are sold to the same class of purchasers and move in the same trade channels. It must be remembered that in a proceeding such as this, "the question of likelihood of confusion must be determined based on an analysis of the mark as applied to the goods and/or services recited in [respondent's registration] vis-a-vis the goods and/or services recited in [petitioner's

registration], rather than what the evidence shows the [actual] goods and/or services to be." Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987). Respondent's registration for PVX encompasses all types of equalizers, amplifiers and pre-amplifiers. Likewise, petitioner's registration of PV encompasses all types of microphones. As noted, by definition, at least certain types of amplifiers and certain types of microphones are complementary.

Having determined that petitioner's goods (microphones) and at least certain of registrant's goods (amplifiers) are related, we turn to a consideration of the marks.

Obviously, respondent's mark PVX encompasses petitioner's mark PV in its entirety, and simply adds the letter X at the end. Thus, in terms of visual appearance and pronunciation, the marks PV and PVX are similar. Moreover, in their entireties, both PV and PVX are lacking in connotation.

Both are arbitrary combinations of letters. When asked how respondent came up with its mark PVX, Mr. Cabasso testified that: "We're [just] picking out letters." (Cabasso dep.

12). It is been held that it is more difficult to distinguish "arbitrarily arranged letters," and that this is true even when the purchasers are "professional persons" and the "products sell in the range of thousands of dollars."

Weiss Associates v. HRL Associates, 902 F.2d 1546, 14 USPQ2d

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1840, 1841 (Fed. Cir. 1990). Of course, in this case, microphones and amplifiers are purchased by ordinary individuals as well as professionals, and many microphones and amplifiers sell for sums far less than "thousands of dollars." See respondent's answer to interrogatory No. 17. In Weiss, the Court found that there was a likelihood of confusion resulting from the contemporaneous use of TMS and TMM despite the fact that the purchasers were professional and discriminating, and despite the fact that the products involved cost thousands of dollars. While in Weiss it was found that the goods were "directly competitive," and while here the goods are merely complementary, by the same token, as previously noted, in the present case the goods (microphones and amplifiers) can be sold to ordinary consumers for sums far less than thousands of dollars.

Moreover, one other critical factor must be kept in mind. Both petitioner's registration of PV and respondent's registration PVX are in typed capital letters. This means that both registrations are "not limited to the mark[s] depicted in any special form." Phillips Petroleum v. C.J. Webb, 442 F.2d 1376, 170 USPQ 35, 36 (CCPA 1971). Accordingly, in our likelihood of confusion analysis, we "must consider all reasonable manners in which those [letters] could be depicted." INB National Bank v. Metrohost, 22 USPQ2d 1585, 1588 (TTAB 1992).

In paragraph 13 of his affidavit, Mr. Cabasso states that in practice, "the X portion of registrant's mark PVX is highlighted and emphasized in use." While this is true, by the same token, the highlighting of the letter X in respondent's mark PVX causes the letters PV to stand out as a separate unit apart from the mark PVX in its entirety. Reproduced below is a portion of the specimen of use which respondent submitted with its application and which shows the PV portion of respondent's mark PVX standing somewhat apart.

However, more importantly, inasmuch as respondent's registration of PVX is in typed capital letters and thus is not limited to any special form of presentation of the mark, respondent is free to depict its mark PVX in a manner where the letters PV are depicted in larger form and the letter X is depicted in smaller form. When so depicted, respondent's mark PVX would be very similar to petitioner's mark PV such

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that their use on complementary audio products purchased by ordinary consumers would result in a likelihood of confusion.

Decision: The petition for cancellation is sustained solely on the basis that the contemporaneous use of petitioner's mark PV for microphones and respondent's mark PVX for, at least, amplifiers is likely to cause confusion.

R. F. Cissel

E. J. Seeherman

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